BEFORE THE PUBLIC DISCLOSURE COMMISSION
OF THE STATE OF WASHINGTON

IN THE MATTER OF ENFORCEMENT ACTION AGAINST DENNIS NUSBAUM, Ballard High School Seattle School District No. 1, Respondent.	PDC CASE NO. 04-664 RESPONDENT'S PRE-HEARING BRIEF

I. STATEMENT OF FACTS

The Public Disclosure Commission adopted Interpretative Statement No. 01-03, entitled Guidelines for School Districts in Election Campaigns. The Guidelines set forth the Commission's implementation of RCW 42.17.130, which generally prohibits the use of public office or agency facilities in political campaigns.

With respect to both employees and union representatives, the Guidelines provide, in part, under the "Permitted Column," as follows:

> May, during non-work hours, make available campaign materials to employees in lunchrooms and breakrooms, which are used only by staff or other authorized individuals.

With respect to "Union Representatives" under the "Not Permitted" column, the Guidelines provide, in part, as follows:

> Shall not distribute promotional materials in classrooms or other public areas.

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Shall not use the school's internal mail or email system to communicate campaign-related information, including endorsements.

WEA challenged the restrictions on the use of the employee mailbox and e-mail to deliver and receive information related to election campaigns when employees may receive and deliver any other type of information in their school mailbox and email. King County Superior Court Judge Richard McDermott determined that these sections of the Guidelines violated the first amendment rights of public school employees. The Public Disclosure Commission appealed to the Washington Supreme Court, which determined that the issues raised by the employees were not justiciable because there were no enforcement actions pending. ***Washington Education Association v. Washington State Public Disclosure Commission***, 150 Wash.2d 612, 80 P.3d 608 (2003).

Subsequently, Evergreen Freedom Foundation filed complaints with the Public Disclosure Commission, presumably because they received information from school employees regarding the use of school mailboxes and e-mail in relation to Referendum 55. See Rep't. of Investigation, Exhibit 1, p. 1.

One of these complaints concerns Dennis Nusbaum, a building representative for the Seattle Education Association at Ballard High School. He received an email at his school email address from the Seattle Education Association with information related to the Referendum 55 petitions. The email informed employees of the means to return completed petitions. Mr. Nusbaum wrote a few lines informing colleagues to "return completed petitions by noon tomorrow" and forwarded the email he received from Seattle Education Association to the staff

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at Ballard High School. Rep't. of Investigation, Ex. 1, p. 2. Ballard High School has over 130 staff, many of whom do not work regular hours. Mr. Nusbaum felt that the information was neutral and that email was the only way to quickly get the information out to the SEA members. Mr. Nusbaum did not know that forwarding this email might violated RCW 42.17.130. Had he known, he would not have forwarded the email.

Mr. Nusbaum, in his role as a volunteer Association building representative, had designed a system to keep track of the petitions that he distributed so that employees had to sign for the petitions at the time they received them. He believes that he hand- delivered them and does not recall placing these petitions in the school mailbox of any employee. Neither is there any evidence that he directed teachers to place completed petitions in his school mailbox.

In Seattle, school mailboxes are used in his school for the receipt of any information, including commercial information and other personal information, as his principal stated in his interview with the PDC investigator.

Prior to June 2, 2004, Mr. Nusbaum received no training regarding the use of the school's internal mail systems for distribution of material related to election campaigns. After June 4, 2004, Mr. Chinn, the interim principal at Ballard High School met with Mr. Nusbaum and told him to refrain from using the school email for election-related messages. After June 4, 2004, Mr. Chinn also sent a memo from Susan Harris, PDC Assistant Director, to all Ballard High School staff, reminding staff of the prohibition on the use of mail systems to promote or oppose ballot propositions. Rep't. of Investigation, Ex. 6. Mr. Nusbaum has followed Mr.

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Chinn's directive and has ceased using email for election-related messages. Mr. Nusbaum has followed that directive and has ceased using the email for election-related messages.

II. ARGUMENT

A. MR NUSBAUM DID NOT VIOLATE RCW 42.17.130.

1. PLACING A DOCUMENT IN A MAILBOX, IF IT OCCURRED, DOES NOT CONSTITUTE USE OF THE "MAIL SYSTEM" AS PROHIBITED BY THE GUIDELINES.

The testimony will not establish that Mr. Nusbaum placed any petitions in the school mailboxes of any Ballard High School employees.

However, even if the Commission finds that Mr. Nusbaum placed political materials in the school mailboxes, the Guidelines do not prohibit the use of the mailbox *per se*. The Guidelines prohibit use of the "mail system." It would be contrary to the intent of RCW 42.17.130 for the Commission to construe use of the mailbox to be a statutory violation. The term "system" implies delivery from point "A" to point "B." But, merely placing an item in a receptacle is different. As a practical matter, this receptacle is available and used by school employees for the receipt of <u>any</u> information. The District does not censor the information put into staff mailboxes. See Statement of Charles Chinn, Report of Investigation, Ex. 8. The recipient employee was free to read or toss the information received just as the recipient would be free to do with any other document received.

The facts in this case are factually distinct from those in Declaratory Ruling No. 4. There, newsletters were placed on school district vehicles, transported to the school by an employee during working hours for distribution by local association officer to school

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employees. Here, clearly, there was no use of district vehicles and no paid work time for any employee.

Had Mr. Nusbaum asked another District employee to deliver the document from point A to point B, public funds may have been expended to pay the salary of the employee whose job it is to deliver the mail. And, the document would have been delivered since outside mail is delivered and placed in staff mailboxes without being reviewed. See Report of Investigation, Ex. 8. Yet, in the factual scenario presented, no public funds were used.

Another example illustrates the arbitrariness of the staff's interpretation of RCW 42.17.130. If the union had used the U.S. Postal Service to mail the document to each employee at their school address with postage affixed, it would be within the job duties of the school employee who distributes mail to distribute this particular mail, regardless of the content. In this scenario, public funds would be used to pay the mail carrier employed by the school district to deliver the mail, which might be in support of an election campaign. Yet, no violation would be found. Certainly, avoiding the use of the mail system and therefore avoiding the necessity of having paid staff deliver the mail should not result in a violation.

2. MR. NUSBAUM DID NOT "USE" PUBLIC FACILITIES IN SUPPORT OF AN ELECTION CAMPAIGN.

Even if the Commission determines that Mr. Nusbaum used the mailbox, his use of the mailbox did not constitute a "use" of public facilities prohibited by RCW 42.17.130. There is simply no "use" of public facilities in the placement of an item in a receptacle such as a mailbox. A "use" of facilities under RCW 42.17.130 must involve a measurable expenditure

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of government funds or have a measurable dollar value. Private political conversations between employees on non-work time on school property are not proscribed by RCW 42.17.130. And, standing in the staff lounge on school property to discuss an election campaign, specifically permitted under the Guidelines, uses no more or less of the state's resources than the placement of a document in mailbox receptacle. It costs districts nothing to allow teachers and unions to place written materials in the intra-office mailboxes.

Additionally, the Seattle School District provides an email account for each employee to use.[1] While the creation of an e-mail account has monetary value, the incremental cost of any particular e-mail message(s) sent or received on an existing account is *de minimis*. Because the Seattle School District allows personal or union use of intra-office mail and e-mail, RCW 42.17.130 does not forbid their use for personal political messages. Additionally, had the SEA representative sent the email from the SEA computer to each Association member at their school district email address, there would be no violation.

RCW 42.17.130 does not define "use" of facilities. In regulation, PDC offers no definition of "use." Neither have Washington courts defined "use." To be consistent with the goals of the statute, the PDC should focus on the measurable monetary value of facilities "used" by the employee. This interpretation respects the employee's right to hold and express their chosen political beliefs at no cost to the public when not performing job duties, consistent with the PDC recognition of the rights of the employee in WAC 390-05-271(1):

[1] The only restriction on the use of email is the restriction for dissemination of political materials. See Report of Investigation, Ex. 8.

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> RCW 42.17.130 does not restrict the right of any individual to express his or her own personal views concerning, supporting, or opposing any candidate or ballot proposition, if such expression does not involve a use of the facilities of a public office or agency.[2]

The purpose of 42.17.130, to ensure that the government does not use public resources to support or oppose any particular viewpoint in a political campaign, does not justify finding a violation here. Our courts have held that RCW 42.17.130 is clearly implicated when agencies make "a significant campaign effort" on behalf of a candidate or ballot issue, or when the agency endorses initiatives that alter agency powers in a way that creates a conflict of interest. *King County Council v. PDC*, 93 Wn.2d 559, 566, 611 P.2d 1227 (1980) (county council resolution endorsing ballot initiative is "normal and regular conduct" and not prohibited by RCW 42.17.130). In *City of Seattle v. State of Washington*, 100 Wn.2d 232, 247, 668 P.2d 1266 (1983), the Court stated:

> The purpose intended [by RCW 42.17.130] was to prohibit the use of public facilities for partisan campaign purposes. The incumbent's use of publicly provided stamps to mail out his campaign literature is a typical example of the abuses which were targeted.

The proper inquiry under the statute must be expenditure of public funds and not the space in the mailbox available for a wide array of information or the cost associated with transmitting a single email, which such email is established and used for a wide variety of messages.

The meaning of "use" of public facilities has been addressed by Attorney General Opinions. These explain that RCW 42.17.130 codified the common law rule against spending

[2] Similarly, the Commission has recognized that no use of public resources is implicated by the wearing of a campaign button during normal working hours. PDC Interpretation 92-01. To ban an employee from placing a

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public funds for private purposes; as a result, the controlling inquiry should be whether public moneys are spent. These AG opinions quote with approval a since-repealed regulation of the PDC:

> it shall be the policy of the commission to construe the term "use of any facilities" as meaning only (1) uses of "facilities," as that term is therein defined, which constitute or result ***in a measurable expenditure of public funds; or (2) such uses which have a measurable dollar value.***

(Emphasis added). ***See*** 1979 AGO No. 3; 1975 AGO No. 23; 1973 AGO No. 26. As a result, the statute "does not apply to '*de minimis*' uses; e.g., the minimal use of office time and space while responding verbally to an inquiry; an incidental remark made in the course of an official communication, etc." 1975 AGO No. 23, footnote 4.[3]

Similarly, the Fifth Circuit held that allowing school employees who have access to those facilities to use the internal mail system does not violate the constitutional prohibitions against the gifting of public funds and did not constitute an "unlawful grant of public funds." ***Texas State Teach Ass'n. v. Garland Indep. Sch. Dist.***[4]

B. PROHIBITING THE USE OF THE MAILBOX AS A RECEPTACLE TO RECEIVE INFORMATION AND THE USE OF EMAIL VIOLATES THE FREE SPEECH RIGHTS OF EMPLOYEES.

Finding a violation here is more restrictive than what RCW 42.17.130 requires and thus unquestionably unconstitutionally restricts the free speech of the affected employees.

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document in a school mailbox, during non-working hours, is inconsistent with this Commission Interpretation and without rational distinction.

[3] See also ***Colorado Taxpayers Union, Inc. v. Romer***, 750 F.Supp. 1041, 1044 (D. Colo. 1990) (*de minimis* expenditures do not implicate use of public funds), *dismissed on other grounds*, 963 F.2d 1394 (10th Cir. 1992).

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Restrictions on political speech, under both the First Amendment and Art. I § 5 of the Washington State Constitution, are presumptively unconstitutional. The State bears a "well-nigh insurmountable" burden of demonstrating that that action is both "narrowly tailored and necessary to further a compelling State interest." ***State v. 119 Vote No! Comm.***, 135 Wn.2d 618, 623-624, 957 P.2d 691 (1998)[5] wherein, the Court stated:

> Exacting scrutiny will invalidate the statute unless the State demonstrates a compelling interest that is both narrowly tailored and necessary. . . . Such burdens are rarely met. . . . ("The State bears the burden of justifying a restriction on speech"). *Id.* The State cannot sustain such a burden herein.

1. CONTENT-BASED RESTRICTIONS ARE PROHIBITED UNLESS SUCH CONTENT CREATES A MATERIAL AND SUBSTANTIAL INTERFERENCE IN THE WORKPLACE.

Mailboxes are used by Seattle School District employees to exchange all types of private communications. Employees are permitted to use e-mail for all types of correspondence, except political messages. The restriction on political messages would be invalid if the District were to enforce it just as it is invalid here. The appropriate First Amendment analysis to be applied is whether Mr.. Nusbaum has caused a "substantial and material disruption to the educational process" by using the mailbox, if the Commission finds he did, and e-mail for political communications. Absent such disruption, the PDC may not prohibit employees from using their school mailbox or email on the basis of their subject matter since singling out such speech is an unconstitutional content-based restriction upon free speech.

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[4] ***Texas St. Teachers Ass'n. v. Garland Indep. Sch. Dist.***, 777 F.2d 1046 (5th Cir. 1985) *summarily affirmed by* ***Garland Indep. Sch. Dist. v. Texas St. Teachers Ass'n.***, 479 U.S. 801, 93 L.Ed.2d 4, 107 S.Ct. 41 (1986).

[5] *Accord* ***Senate Republican Campaign Comm. v. Public Disclosure Comm'n***, 133 Wn.2d 229, 244-5, 943 P.2d 1358 (1997); ***Buckley v. Valeo***, 424 U.S. 1, 21-25, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976).

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No such disruption has been alleged here and none exists. Thus, staff has alleged a violation that unconstitutionally restricts the private speech of school employees and union members who work within the school building and thus have access to the school building.

In ***Garland***, supra, the Fifth Circuit considered whether a school district may prohibit teachers from using the school district internal mail facilities for circulation of any materials relating to union issues.[6] The appropriate analysis to be applied to teachers' internal communications in the workplace was set forth in ***Tinker v. Des Moines Independent Community Schools***,[7] specifically whether "the expression or method of exercise of such communications **materially and substantially interfere with the activities or discipline in the school.**"[8] Absent such disruption, the First Amendment prohibits the state from suppressing private communications between teachers based upon the content of such communications. Thus, so long as employees are allowed to use the internal mail facilities of the school for other private communications, i.e. flyers regarding football, recipes, and potlucks, it is unconstitutional to prohibit use of those facilities to discuss their union, as such a restriction amounted to a content based restriction. *Id.* at 1054.

The Commission should dismiss the complaint because there is absolutely no evidence that Mr. Nusbaum's use of email and use of the mailbox at school "materially and substantially disrupted the activities or discipline in the school."

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[6] ***Garland*** was summarily affirmed by the U.S. Supreme Court and thus is binding precedent here *See* Memorandum Opinion, ***Garland Independent School Dist. v. Texas State Teachers Assn***. 479 U.S. 801, 107 S.Ct. 41, 93 L.Ed.2d 4 (1986); *See also* ***Garland Independent School Dist. v. Texas State Teachers Assn***., 489 U.S. 782, 109 S.Ct. 1486, 103 L.Ed.2d 866 (1989).

[7] 393 U.S. 503, 513, 89 S.Ct. 733, 21 L.Ed.2d (1969).

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Additionally, finding a violation here would be unconstitutional because restrictions on speech based on political content cannot be considered valid time, place or manner restrictions. Under the First Amendment, the government may only impose reasonable time, place, and manner restrictions on speech that are (1) content neutral, (2) narrowly tailored to serve a substantial governmental interest,[9] and (3) leave open alternative channels for communication. Such is not the case here. In Ballard High School, there are approximately 130 staff with varying schedules. There is simply no way for staff to reach each other on short notice without the *de minimus* use of mailboxes and e-mail. A statutory interpretation that results in a violation here would fail the most essential prong of the time, place and manner test. This result would not leave open any legitimate channels for communication between employees, especially when there is a need to communicate on short notice.

2. FINDING A VIOLATION IS NOT NECESSARY TO PRESERVE GOVERNMENT NEUTRALITY.

It is neither necessary nor constitutional to restrict the speech of public employees in a non-instructional setting to preserve government neutrality.[10] In ***San Diego Unified Sch. Dist.,*** *supra,* the California Supreme Court held school districts can restrict political speech of its employees in an instructional setting because such speech bears the imprimatur of the school. However, such restrictions in non-instructional settings cannot be enforced because when

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[8] ***Garland***, *supra* at 1053.

[9] Article I § 5 of the Washington State Constitution is even more restrictive, requiring that time, place and manner restrictions be narrowly tailored to fulfill a "**compelling**" state interest. ***Collier v. Tacoma***, 121 Wn.2d 737, 747, 854 P.2d 1046 (1993). (internal citation omitted; emphasis added).

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school employees express their political views to each other in non-instructional settings, there is very little risk their views will be attributed to the school district. Presumably, this reasoning is the basis for the Guidelines' explicit approval of political speech in staff lounges and faculty rooms. Consequently, restrictions on use of the mailboxes and email during non-work hours are unenforceable restrictions in non-instructional settings.

Similarly, the Ninth Circuit has distinguished between public employees engaged in private discussions on their own time and employees acting in their official capacity.[11] The Ninth Circuit dismissed the imprimatur justification as related to private discussions recognizing that "speech by a public employee, even a teacher, does not always represent, or even appear to represent, the views of the state." *Id.* at 1213. That court also dismissed the State's asserted interest in prohibiting the use of public resources, finding that an employee's speech in his private office, albeit on public property, does not involve the use of public resources. *Id.* at 1212. Moreover, since a school board could issue a formal endorsement of a ballot measure without violating the statute, it would be inconsistent to mandate "positions of neutrality" by every district and every employee. See ***King County Council***, supra.

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[10] *See* ***L.A. Teachers Union, AFT v. LA City Bd. of Ed.***, 71 Cal 2d 551, 455 P.2d 827, 78 Cal. Rptr. 723, 729 (1969) and ***California Teachers Ass'n v. Bd. of San Diego Unified Sch. Dist.***, 45 Cal.App.4th 1383, 53 Cal. Rptr.2d 474 (1996).

[11] ***Tucker v. State Dep't of Education***, 97 F.3d 1204, 1213 (9th Cir. 1996) (concerning a state agency order prohibiting advocacy of religion in the workplace in order to avoid the appearance that the state favored religion) stating:

> What Tucker, a computer analyst ... discusses in his cubicle or in the hallway with other computer analysts, clearly would not appear to any reasonable person to represent the views of the state. Certainly, nothing Tucker says about religion in his office discourse is likely to cause a reasonable person to believe that the state is speaking or supports his views. Allowing employees ... to discuss whatever subject they choose at work, be it religion or football, may incidentally benefit religion (or football), but it would not give the appearance of a state endorsement.

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Mr. Nusbaum's use of email and the mailbox for political messages, if any, during non-instructional time at school clearly does not amount to an endorsement by the school district of those political issues.

3. PUBLIC FORUM ANALYSIS DOES NOT APPLY HERE.

The PDC staff is likely to erroneously argue that based on ***Perry Educ. Ass'n. v. Perry Local Educator's Ass'n.***[12] the government is free to censor any speech occurring in a government facility so long as that facility is not open to the general public for unlimited discourse. Yet, ***Perry*** concerned an outside organization, specifically, a union, that sought access to the school district's internal mail system on the basis that the school granted such access to another union. This analysis is only applicable when determining to what extent government can limit **outsiders** or those speaking with the imprimatur of the state from having **access** to public facilities or other public modes of communication, such as mailboxes and e-mail. This analysis is not applicable to use of mailboxes or email by employees who already have access to these mail facilities by virtue of their employment and whose speech bears no imprimatur of the state.

Unless it has been opened to the general public, a school mail system is not a public forum.[13] Finding a violation here would unconstitutionally restricts jobsite communications by public employees, i.e. "insiders," in their place of employment. Recognizing that public forum

[12] 460 U.S. 37, 103 S.Ct. 948, 74 L.Ed.2d 794(1983).
[13] ***Garland***, supra at 1052.

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analysis did not apply to those employed in the school who already have access to the facility, the ***Garland*** court stated that this analysis:

> which concerns the rights of organizations outside the schools, **does not apply to teacher communication within the school . . . Teacher communications may be suppressed only when 'the expression or its method of exercise materially and substantially interferes with the activities or discipline in the school.'** [14]

Mr. Nusbaum is employed in a school building. He is an insider who already has access to the facilities. Thus, finding a violation here unconstitutionally restricts jobsite communications by and between public employees, i.e. "insiders," in their place of employment. Prohibiting use of the school mailbox and email facilities to exchange political materials on non-work time is neither necessary to ensure elections free from government support nor to avoid the appearance of government imprimatur. There is no showing of any disruption to the workplace caused by the use of mail facilities to exchange political materials during non-work hours. The PDC should dismiss the complaint.

4. PRIOR RESTRAINTS ARE UNLAWFUL *PER SE* UNDER THE WASHINGTON CONSTITUTION.

The PDC staff has suggested that Mr. Nusbaum should be found in violation of RCW 42.17.130 for suggesting to other employees that they place completed petitions in his school mailbox. First, there is no evidence that he made such a suggestion. Even if he had, which he does not concede, such a violation would clearly violate Mr. Nusbaum's free speech rights as it is a prior restraint on speech. If it is the use of the mailbox indeed constitutes a violation,

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which Respondent does not concede, no violation can exist until the mailbox is actually used. "A governmental attempt to restrict the content of future speech, deemed prior restraint, bears a heavy presumption against its constitutional validity under the First Amendment to the federal constitution and is unconstitutional *per se* under Article 1, § 5 of the state constitution."[15]

The United States Supreme Court defines prior restraints as:

> '[A]dministrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur.'

Court orders that actually forbid speech activities--are classic examples of prior restraints.[16] Similarly, finding a statutory violation for suggesting that an item be placed in a mailbox would unequivocally prohibit protected political speech prior to its occurrence. As such, it is a prior restraint, and the PDC must dismiss this portion of the Administrative Charges.

C. MR. NUSBAUM'S E-MAIL DID NOT "PROMOTE A BALLOT PROPOSITION."

Even if the Commission decides that it is lawful to prohibit the use of mailboxes and email for political materials, the e-mail document created by Mr. Nusbaum is not within the scope of the prohibition contained in RCW 42.17.130, which expressly states:

> No ... person ... employed by any public office or agency may use or authorize the use of any of the facilities of a public office or agency, directly or indirectly, for the purpose of assisting a campaign for election of any person to any office or **for the promotion of** or opposition to **any ballot proposition.**

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[14] ***Garland***, 777 F.2d at 1053 (emphasis added)(internal citations omitted).

[15] ***DCR, Inc. v. Pierce County***, 92 Wn. App. 660, 670, 964 P.2d 380 (1998); ***JJR Inc. v. City*** of Seattle, 126 Wn.2d 1, 6 & n.4, 891 P.2d 720 (1995).

[16] ***In re Marriage of Suggs***. 152 Wn.2d 74. 2004 WL 1515992, *3 (Wash.,2004) citing ***Alexander v. United States***, 509 U.S. 544, 550, 113 S.Ct. 2766, 125 L.Ed.2d 441 (1993) (internal citations omitted).

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The communications at issue do not expressly promote a ballot proposition and thus are not within the reach of RCW 42.17.130. Mr. Nusbaum has stated that he was communicating neutral information from the union to its members, in order to fulfill his obligation as building representative for the Seattle Education Association. See Report of Investigation, Ex. 2. He was neither directing anyone to collect signatures nor encouraging anyone to do so. He was simply fulfilling his obligations as a union representative to communicate information that the union wanted communicated. He felt that the email was the most expedient way to provide information to union members about the process for returning petitions, if they had any to return. Ex. 1, at 2; Ex. 3, at 6.

Additionally, "express advocacy" may be regulated, while "issue advocacy" may not. ***Washington State Republican Party v. Public Disclosure Commission***, 141 Wn.2d 245, 4 P.3d 808 (2000). "Express advocacy" concerns communications advocating election or defeat. Conversely, "issue advocacy" concerns communications providing information about political issues germane to an election but not containing specific words that constitute an exhortation to vote. Applying that distinction to the facts at hand, the Commission cannot regulate issue advocacy in an attempt to enforce RCW 42.17.130 since the language of the statute's prohibitions is similar to that analyzed by the court in ***WSRP***, *supra* and ***Buckley v. Valeo***, 424 U.S. 1 (1976).

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In ***McConnell v. Federal Election Commission***,[17] the U.S. Supreme Court held that the express advocacy/ issue advocacy distinction was one of statutory interpretation but not one of constitutional significance. The impact of ***McConnell*** on Washington statutes and its case law has not been determined. For the present time, neither the Legislature nor the Commission have adopted any regulations that invalidate the ***Republican Party*** case cited herein. Consequently, the Commission should determine that the communications in this case do not fall within the scope of the statute's prohibitions.

D. THE PDC'S 1980 DECLARATORY ORDER IS NOT CONTROLLING.

For a variety of reasons, the PDC's 1980 Declaratory Order is not controlling here. First, subsequent to its issuance, ***Garland*** was affirmed by the U.S. Supreme Court and is the controlling law here. Second, the facts in the Declaratory Order significantly differ from the facts in this case. Solely placing a document in a mailbox by a volunteer union member during non-work hours, which is not even proven to have occurred, does not constitute "use of the mail system," while in the Declaratory Order, newsletters were transported to the site on school district vehicles during work time. Third, in 1980 email did not exist and the type of usage associated with email is not addressed by the Declaratory Order. Finally, the information at issue here is not candidate-related and the Declaratory Order is limited to its facts which were concerning promotion of a candidate.

E. IF A VIOLATION IS FOUND, THE APPROPRIATE PENALTY IS LESS THAN $500.

[17] 540 U.S. 93, 124 S.Ct. 619, 157 L.Ed.2d 491(2003).

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This matter should have been addressed in a brief enforcement hearing. WAC 390-37-140(1) provides that:

> The commission may provide a brief adjudicative proceeding for violations of the sections of chapter 42.17 RCW that it enforces in which the facts are undisputed, the violations appear to be relatively minor in nature, and a penalty no greater than $500 will be assessed for the violations. Typical matters to be heard in a brief adjudicative proceeding include, but are not limited to, the following:
>
> (c) Use of public office facilities in election campaigns when the value of public funds expended was minimal.

Clearly, this case presents the type of factual scenario which falls within the purview of WAC 390-37-140. As explained above, the value of the public funds expended was either non-existent or minimal.

If this case is not dismissed, a minimal penalty should be imposed.

III. CONCLUSION

For the reasons stated herein, the PDC should dismiss this case. If the PDC does not dismiss the case, a minimal penalty should be imposed

Dated this 18th day of January, 2005.

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